



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 22, 2004

Ms. Donna L. Clark
Assistant Criminal District Attorney
Lubbock County
916 Main Street, Suite 1101
Lubbock, Texas 79401

OR2004-8094

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 209667.

The Lubbock County Sheriff's Office (the "sheriff") received a request for information pertaining to a former employee. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that the submitted information contains an arrest warrant that must be released. Article 15.26 of the Code of Criminal Procedure states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Crim. Proc. Code art. 15.26. We have marked the arrest warrant that must be released pursuant to article 15.26.

We next note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information includes completed evaluations made of, for, or by the sheriff. You must release the completed evaluations under section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law.¹ Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential), 542 at 4 (1990) (litigation exception may be waived). As such, section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022. Therefore, the sheriff may not withhold the information that is subject to section 552.022(a)(1) under section 552.103.

Next, we address your claim under section 552.103 of the Government Code with regard to the information that is not subject to section 552.022. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

¹The sheriff does not claim section 552.108 of the Government Code.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). After careful review of your arguments and the records at issue, we conclude you have not established that the information at issue pertains to litigation that was pending or reasonably anticipated on the date that the sheriff received the request for information; therefore, none of the information at issue is excepted under section 552.103.

We note that section 552.101 of the Government Code is applicable to some of the submitted information. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. The disclosure of medical records is governed by the Medical Practice Act (the "MPA"), as codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. *See* Open Records Decision No. 598 (1991). We have marked the submitted information that is subject to the MPA. The sheriff may release that information only if the MPA permits the sheriff to do so.

We note that the submitted records contain fingerprint information, the public availability of which is governed by sections 560.001, 560.002, and 560.003 of the Government Code. These sections provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003. There is no indication that the requestor has a right of access to this information under section 560.002. Therefore, the sheriff must withhold the fingerprint information under section 552.101 in conjunction with section 560.003 of the Government Code.

The submitted information contains declarations of psychological and emotional health and drug dependency reports that are required by the Texas Commission on Law Enforcement Officer Standards and Education (the "commission") and that are confidential pursuant to Section 1701.306 of the Occupations Code. Section 1701.306 provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Occ. Code § 1701.306(a)-(b) (emphasis added). We have marked the information that the sheriff must withhold under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

The submitted information also includes a Report of Separation of License Holder addressed to the Texas Commission on Law Enforcement ("commission"). This form, commonly referred to as an "F-5," is subject to section 1701.454 of the Occupations Code. Section 1701.452 requires that a law enforcement agency submit a report to the commission

regarding an officer licensed under chapter 1701 whose appointment with the law enforcement agency is terminated. *See* Occ. Code § 1701.452. Section 1701.454 provides:

(a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subsection, a commission member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the commission employee having the responsibility to maintain the report or statement and only if:

(1) the head of a law enforcement agency or the agency head's designee makes a written request on the agency's letterhead for the report or statement accompanied by the agency head's or designee's signature; and

(2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by the commission that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

Occ. Code § 1701.454. It does not appear that the submitted F-5 form meets the criteria for disclosure provided under section 1701.454. Therefore, the sheriff must withhold this form pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided

by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F.

Section 552.101 of the Government Code also encompasses the common law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Upon review, we conclude that some of the information submitted to this office is both highly intimate or embarrassing and of no legitimate public interest. The sheriff must withhold the information we have marked as coming within the common-law right of privacy under section 552.101.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, personal pager and cell phone numbers, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. To the extent that the types of information we have marked under section 552.117 relate to a peace officer employed by the sheriff, the information must be withheld under section 552.117(a)(2).

To the extent that the types of information that we have marked under section 552.117 do not relate to a peace officer employed by the sheriff, the information may be excepted from disclosure under section 552.117(a)(1). Section 552.117(a)(1) excepts the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept

confidential under section 552.024. The determination of whether a particular item of information is protected by section 552.117(a)(1) must be made at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, the sheriff may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the sheriff's receipt of the request for the information. The sheriff may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election for confidentiality under section 552.024. Therefore, the section 552.117 information of any current or former employee who timely elected confidentiality for the information under section 552.024 must be withheld under section 552.117(a)(1).

Section 552.1175 also may be applicable to some of the submitted information. This section 552.1175 provides in part:

(a) This section applies only to:

- (1) peace officers as defined by Article 2.12, Code of Criminal Procedure;
- (2) county jailers as defined by Section 1701.001, Occupations Code;
- (3) current or former employees of the Texas Department of Criminal Justice or of the predecessor in function of the department or any division of the department; and
- (4) commissioned security officers as defined by Section 1702.002, Occupations Code.

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)-(b). To the extent that the types of information that we have marked under section 552.1175 relate to a county jailer under section 1701.001 of the Occupations Code, a current or former employee of the Texas Department of Criminal Justice or a division of the department, or a peace officer of another governmental entity, the

sheriff must withhold the information under section 552.1175 if the individual to whom it pertains has elected to restrict access to the information in accordance with section 552.1175(b).

In the event that section 552.117 or section 552.1175 does not apply and a section 552.024 election to keep information confidential was not made, the social security numbers found in the submitted information may still be confidential under federal law. Section 552.101 encompasses amendments to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), that make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the sheriff should ensure that such information is not obtained or maintained by the sheriff pursuant to any provision of law enacted on or after October 1, 1990.

The submitted documents also include Texas driver's license information. Section 552.130 of the Government Code excepts from public disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). The sheriff must withhold the information we have marked under section 552.130.

Finally, we note that some of the submitted information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the sheriff must release the arrest warrant pursuant to article 15.26 of the Code of Criminal Procedure. The medical records we have marked may only be released in accordance with the MPA. The sheriff must withhold the following information under section 552.101 of the Government Code: (1) fingerprint information in conjunction with section 560.003 of the Government Code; (2) the information we have marked in conjunction with section 1701.306 of the Occupations Code; (3) form F-5 in conjunction with section 1701.454 of the Occupations Code; (4) any CHRI; and (5) the information we have marked in conjunction with common-law privacy. To the extent that the types of information we have marked under section 552.117 relate to a peace officer employed by the sheriff, the information must be withheld under section 552.117(a)(2). The section 552.117 information

of any current or former employee who timely elected confidentiality for the information under section 552.024 must be withheld under section 552.117(a)(1). To the extent that the types of information that we have marked under section 552.1175 relate to a county jailer under section 1701.001 of the Occupations Code, a current or former employee of the Texas Department of Criminal Justice or a division of the department, or a peace officer of another governmental entity, the sheriff must withhold the information under section 552.1175 if the individual to whom it pertains has elected to restrict access to the information in accordance with section 552.1175(b). The sheriff must withhold the Texas motor vehicle information that we have marked under section 552.130. Social security numbers may be confidential under federal law. The remaining requested information must be released in accordance with applicable copyright laws for any information protected by copyright.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles", written in a cursive style.

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/kjh

Ref: ID# 209667

Enc. Submitted documents

c: Mr. Mel Tittle
Managing Editor
Lubbock Avalanche Journal
P. O. Box 491
Lubbock, Texas 79408
(w/o enclosures)